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TAN POH LEE & ORS v. TAN KIM CHOO & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABU BAKAR JAIS J
[SUIT NO: WA-137-01-2016]
13 JUNE 2017

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MENTAL DISORDERS AND TREATMENT: *Inquiry – Application for – Inquiry for determination of first defendant's mental health – Conflicting medical reports – Whether more contemporaneous report preferred – Whether a person should not be made subject of inquiry when there are conflicting medical reports – Whether first defendant entitled to medical experts' opinion finding him mentally capable – Mental Health Act 2001, s. 52*

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The first defendant had suffered a stroke. According to the daughters of the first defendant ('the plaintiffs'), this stroke was massive. The plaintiffs, produced medical reports to support their allegation that the first defendant was unable to follow instructions and that the first defendant's banking and other administrative duties need to be supervised as he was unable to carry out any activities himself. There was also an opinion by a specialist supporting the plaintiffs' allegation that the first defendant may have had acute dementia. On the contrary, the son of the first defendant ('the second defendant') argued that the stroke was not massive and was manageable. The first defendant and second defendant produced contemporaneous medical reports which suggested that the first defendant was not mentally incapable. In the circumstances, the plaintiffs filed an originating summons ('OS') pursuant to s. 52 of the Mental Health Act 2001 ('MHA') for an inquiry against the first defendant to determine whether the latter was mentally disordered and incapable of managing himself and his affairs.

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Held (dismissing originating summons with costs):

(1) Because of the conflicting medical reports by the plaintiffs on one hand, and the first and second defendants on the other, it is best to prefer the medical specialists' opinions obtained by the first and second defendants because the experts' medical reports of the first and second defendants were more contemporaneous compared to the experts' reports of the plaintiffs. As the reports reflected the latest mental condition of the first defendant, the inquiry requested could not be justified. (para 25)

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(2) Where there are conflicting medical reports on the state of mental health of a person, it is incumbent that the benefit of doubt should be given to that person. It is totally unnecessary and more likely to cause injustice if the views of medical experts saying that a person may be mentally challenged should prevail over the equally competent opposing medical experts who take a different stand. This was not a case where the

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medical reports favoured the plaintiffs alone. On the contrary, there were equally qualified medical specialists who said that the first defendant was not mentally challenged. When things are equal, that very person should have a substantial say whether he is mentally able in view of the support he gets from his medical experts. (paras 26 & 29)

(3) When there are conflicting medical reports, a person should never be the subject of an inquiry to determine his mental health. He is entitled to the medical experts' opinions finding him mentally capable. To conclude that the opposing medical experts' views on his mental health should be preferred over and above his own medical specialists cannot serve any justice on the very person others want to be declared mentally disordered. It is also to say the least, unsafe, especially when his own medical experts' reports are more recent compared to the opposing experts' reports. Only when there are no conflicting medical reports would it be legitimate to find that a person may have to undergo an inquiry to determine his mental health. (paras 33 & 34)

Case(s) referred to:
Gary Lim Ting Howe v. Lim Pang Cheong & Ors [2015] 9 CLJ 227 HC ***(refd)***
Majuikan Sdn Bhd v. Barclays Bank Plc [2014] 9 CLJ 337 CA ***(refd)***
PP v. Chin Yoke [1939] 1 LNS 66 HC ***(refd)***
Wong Kim v. Loh Kim Foh [2003] 8 CLJ 813 HC ***(refd)***

Legislation referred to:
Mental Health Act 2001, ss. 2, 52(3)

For the plaintiffs - Lim Kean Leong, TT Ng, Keith Kwan, KM Chan, KY Liu & PY Chia; M/s Mohd Zain & Co
For the 1st defendant - Gobind Singh Deo, Joanne Chan & Azizudin Karim; M/s Munawar & Assocs
For the 2nd defendant - Malik Imtiaz Sarwar, K Shanmuga, Jonas Lee & Diesh Kumar; M/s Kanesalingam & Co

Reported by Sandra Gabriel

JUDGMENT

Abu Bakar Jais J:

I can calculate the motion of heavenly bodies, but not the madness of people – Isaac Newton

Introduction

[1] This is far from a case of harmless, fun and laughable sibling rivalry. Instead, the sibling rivalry in this case has taken a turn for the worse. It is also a case where the patriarch felt bitterly disappointed to the point of being emotionally hurt, that his own daughters would have the gumption to assert he might be mentally incapable and is generally not in good physical condition.

[2] The plaintiffs (all daughters of the first defendant) filed the originating summons ('OS') essentially to apply pursuant to s. 52 of the Mental Health Act 2001 ('MHA') for an inquiry against their own father, the first defendant, to determine whether the latter is mentally disordered and incapable of managing himself and his affairs. Also requested is that a committee be set up in the event there is a need to manage his affairs and estate. The second defendant is the brother of the plaintiffs. Their father presently resides with the second defendant.

Background Facts

[3] From here, it is more appropriate to refer the parties to their kindred positions. The father had suffered a stroke. This stroke is massive according to the daughters and manageable according to the son based on some medical reports. The daughters' belief is supported by a consultant neurologist at Gleneagles Hospital. In another hospital for further treatment, Tung Shin Hospital, the consultant physician there found the father unable to follow most instructions and advised the family that the father's banking and other administrative duties need to be supervised as he is unable to carry out any activities himself. Another consultant neurologist at Gleneagles found the stroke to affect two-thirds of the right hemisphere of the brain and the father is unable to make complex decision including his finances and care. There is also opinion by a specialist supporting the daughters that their father may have acute dementia.

[4] The son told his sisters the medical impairment has nothing to do with mental disorder and their father is far from being faculty challenged. A few months later, a consultant psychiatrist and psychotherapist at the University Malaya Specialist Centre found the father to suffer from dementia of vascular in origin and he is not capable of handling his personal and professional matters. Later, the father was taken out from Tung Shin Hospital by the son. The daughters said their brother at least on several occasions, had not responded as to the whereabouts of their father.

[5] On the part of the father and the son, there are medical reports suggesting that the father is not mentally incapable. The father had denied that he is not fit mentally and this is supported by the physicians that had introduced these reports. These reports are more contemporaneous compared to the reports by the daughters' medical specialist. His medical experts' opinions show he can make sound and rational judgment.

[6] Further as could be expected in a family feud of this nature, the issue of wealth comes to play. The daughters and son slung mud at each other with the same reciprocal accusation that the show of concern and affection to their father now is with the sole purpose of trying to control their father only because of their father's moneys and assets.

The Daughters' Contentions

[7] In gist, the arguments of the daughters in support of the OS are as follows.

(a) Their father is a mentally disordered person under s. 2 of MHA and is incapable of managing himself and his affairs that warrant an inquiry under s. 52 of the MHA. They have the *locus standi* to file the OS as they are "relative" as defined in s. 52 (3) read together with s. 2 of the MHA.

(b) They also have the support of their father's private caregiver, employed by their brother and his wife. This caregiver had sworn an affidavit to the effect that their father was to be taken away from Tung Shin Hospital and she was instructed by the son to brainwash their father to dislike the daughters. She also affirmed she had persuaded the father to sign some documents upon the instruction of the son. She was also asked by the son to coach the father in saying certain things before the psychiatrist and lawyers before he was taken to see them. The same thing is required of her when the father was taken to the police station. The caregiver also affirmed that she believes the father is unable to take care of himself and to make any decision on his own.

(c) The medical specialists and their father's caregiver evidence show that they have a *prima facie* case that their father is of unsound mind and incapable of managing himself and his affairs.

(d) This court also has the power even to have the father being personally examined.

(e) What the daughters need to show at this stage is merely a legitimate and arguable case as a definitive finding on the state of the mind of the father can only be done in due course at the inquiry itself and not now.

(f) Their father has been taken out from the hospital and no access had been given to them by their brother. There is a need to know the mental state of their father as there is no certainty that continuous care, treatment, rehabilitation and protection are given to him.

(g) Their father had been cut off by their brother from medical experts who had good knowledge on the health history and mental condition of their father.

(h) Their father had not resume duties as directors and shareholders in a few companies. There is a possibility this could be because of the mental condition of their father.

(i) In commencing the OS, the daughters have only the interest of their father in their mind and the OS is not in any way prejudicial to their father.

A (j) The daughters could not have a *mala fide* intention in pursuing the OS merely to take control of their father assets as they had invited their brother to jointly apply for the OS and as their brother rejected the invitation to be a member of a committee looking after their father, the daughters have no option but to file the same.

B **The Father's And Son's Contentions**

[8] The father's and son's arguments resisting the OS can be summarised as follows.

(a) The medical reports relied by his daughters are not contemporaneous
C documents and do not reflect his present mental condition. He is on the contrary capable of managing his own affairs.

(b) Legally this court must first find a *prima facie* case against him that he is of unsound mind and incapable of managing himself. If there is no *prima facie* case, there can be no order for an inquiry. Only if he is
D mentally disordered can an inquiry be undertaken.

(c) The father has lodged a police report that he does not want to see his daughters anymore. He has affirmed a statutory declaration that he is disappointed by the action of his daughters and prefers now to let his son to take care of him. His affidavit opposes the OS.
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(d) He does not recall being examined by the medical specialist cited by his daughters.

The Court's Findings

F *The Relevant Statutory Provision*

[9] First as the OS is premised on s. 52 of the MHA, it would be fitting to narrate the whole statutory provision as follows:

> (1) **The court may,** on an application made before it, make an order directing an inquiry to determine whether a person subject to the
> G jurisdiction of the court and **alleged to be mentally disordered** is incapable of managing himself and his affairs due to such mental disorder.
>
> (2) The order of the court under sub-s. (1) may also contain directions for inquiries to be made concerning:
>
> H (a) the nature of the property belonging to the person alleged to be mentally disordered;
>
> (b) the persons who are his relatives;
>
> (c) the period during which he has been mentally disordered; or
>
> I (d) such other questions as the Court deems proper.

(3) The application for such an inquiry may be made by a relative of the person alleged to be mentally disordered, or by any public officer nominated by the Minister for the purpose of making the application. (emphasis added)

[10] There are two important considerations that can be seen by the above provision before an inquiry can be ordered as follows:

(a) The court may make an order for inquiry. Because of the word "may", there can be no doubt a discretion is given to the courts whether an inquiry is to be ordered. The provision does not use the word "shall". Therefore, an inquiry is not mandatory when the application is made for such inquiry. The discretionary power of the court in this respect can be deduced from the case *Gary Lim Ting Howe v. Lim Pang Cheong & Ors* [2015] 9 CLJ 227 where Azizul Azmi Adnan JC said:

> Nonetheless, the existence of unchallenged medical opinions does not mean that this court is bound to accept the expert evidence of the medical practitioners. **A court may still make a finding that is contrary to unchallenged medical opinions, if there are other facts that would entitle it to do so.** Wee Chong Jin CJ in the Singapore Court of Appeal case of *Sek Kim Wah v. PP*, referred to the decision of *R v. Byrne* and stated as follows:
>
> > Thus, the verdict as to abnormality of mind is plainly a finding of fact which must be founded of all the evidence which evidence of course includes medical opinion. Even where such medical opinion is unchallenged, the trial Judges would be perfectly entitled to reject or differ from the opinions of the medical men, if there are other facts on which they could do so.
>
> This principle in *Sek Kim Wah* was cited with approval by the Malaysian Court of Appeal in *PP v. Muhamad Suhaimi Abdul Aziz*.

(emphasis added)

(b) There must be allegation that a person is mentally disordered in the application for inquiry. Because of this, the court has a duty to state whether that allegation is potentially true. It cannot be a case that once the allegation is made, the inquiry ought to be ordered. Otherwise it would be far too easy for anyone to request for an inquiry just by asserting that a person is mentally disordered. The courts should ascertain whether there is substance to the allegation in the first place. But what is the degree or standard that is required at this stage in proving the allegation that a person is mentally disordered? In this regard, I accept the contention that the degree or standard required is only a *prima facie* case. At the stage where the application is filed, it does not require that a person is conclusively proven to be mentally disordered. In the

A case of *Wong Kim v. Loh Kim Foh* [2003] 8 CLJ 813; [2003] 4 MLJ 535 the need only to show a *prima facie* case at this stage is explained by Abdull Hamid Embong J (as he then was) as follows:

> … In deciding on this process I had been referred to and follow a number of Indian authorities in particular *Muhammad Yaqub v. Nazir Ahmad & Ors* which decided that the purpose of such a preliminary enquiry was for the judge to satisfy himself that there is a real ground for an inquisition. *At this preliminary stage, the judge should be satisfied that there is some prima facie evidence to establish that the subject is a person of unsound mind and incapable managing himself and his affairs.*
>
> An order directing an inquiry into a person's state of mind is a very serious matter and is intended to be a judicial determination made only upon satisfaction by the judge of its necessity based on adequate material. For this reason, a two-tier inquiry has been preferred under the Indian Lunacy Act 1972, *the earlier or preliminary enquiry with a purposed of determining a prima facie for the inquisition order to be made* under s. 3 of the MDO.
>
> (emphasis added)

[11] However, on *prima facie* evidence, Ananda Krishna has explained what is the meaning of this term. The writer said in his book "*Words, Phrases & Maxims (Legally & Judicially Defined)*" '*prima facie* evidence' as evidence "which suffices for the proof of a particular fact until contradicted and overcome by other evidence." Ananda Krishna referred to *"Sarkar on Evidence"* which defines "*prima facie* evidence" as "evidence which, if accepted appears to be sufficient to establish a fact, unless rebutted by acceptable evidence to the contrary. It is not conclusive."

[12] It is therefore to be noted that *prima facie* evidence can be rebutted by the opposing party. The same is said in *PP v. Chin Yoke* [1939] 1 LNS 66; [1940] 9 MLJ 47 where the relevant passage quotes *Mozley and Whiteley's Law Dictionary* (5th edn) as follows:

> A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.

[13] This is significant in the context of the present case as there is indeed rebuttal evidence from the father and son that the former is not mentally challenged having regard to their medical experts' opinions. Much more of this will be elaborated in a short while.

The Conflicting Medical Reports

[14] The fact that there are a few medical experts who had supported the daughters for the OS now has already been explained. The conclusion from these experts is that the father is mentally impaired to take care of himself and in the context of this case, his finances. Taken to the extreme, these experts' opinions support the argument that the father should be the subject of an inquiry to determine if he is mentally disordered. Therefore, this court should not be accused of failing to acknowledge the findings of the medical experts of the daughters. It is accepted that these experts' diagnosis of the father should carry notable weight. For instance, Dr Stephen Jambunathan, a consultant psychiatrist and psychotherapist at the University of Malaya Specialist Centre in his medical report on 25 January 2016 said of the father as follows:

> I have diagnosed him as suffering from dementia of vascular in origin. Mr Tan is not capable of handling his personal and professional matters and will need legal protection to assist him and family in managing the estate.

[15] Or take the views expressed on 14 September 2015 by Dr Ming Hui Yang, a consultant physician and chest medicine at the Tung Shin Hospital on the father's health condition as follows:

> He is unable to speak, communicate or fully understand all instructions. Please would you kindly contact the family members to carry out any banking/administrative duties in his behalf in view of the patient is unable to carry out any activities himself.

[16] However, above all these, a great and significant importance is for this court not to lose sight of the fact that these experts' views are heavily challenged by the father and son's medical specialists. And in this regard, there are seven medical reports tendered by the father and son. More weight should also be attached to these reports as they are more contemporaneous spanning from 16 November 2015 until 11 October 2016 as follows:

(a) the second medical report by Dr Ming Hui Ying dated 16 November 2015;

(b) the medical report prepared by Dr Deva Dass dated 8 April 2016;

(c) the medical report prepared by Dr Xavier Vincent Pereira dated 8 April 2016;

(d) the second medical report prepared by Dr Xavier Vincent Pereira dated 24 May 2016;

(e) the second medical report prepared by Dr Deva Dass dated 27 May 2016;

A (f) the medical report prepared by Dr Chiam Peak Chiang from Institute of Mental Health, Singapore dated 20 July 2016; and

(g) the medical report prepared by Dr Daniel Zainal Abdul Rahman dated 11 October 2016.

B **[17]** The essence of these specialists' reports in turn divergently opposes the daughters' experts' opinions. In fact, Dr Ming Hui Ying, the daughters' own expert whose opinion was alluded earlier, after examining the father again said:

> The above patient is currently stable. The pneumonia has been treated.
C Patient is able to … and is on refeeding. Currently he requires physiotherapy and nursing care. He is fit to discharge to … medical department if the family so wishes/agrees.

[18] Dr Deva Dass in his medical report dated 8 April 2016 said:

> During the interview he was alert, spontaneous with his talk in English
D with no evidence of confusion or disorientation or defective memory. He was able to answer all my questions appropriately, even ask me the correct questions related to his physical ability. Emotionally there was no indication of a major psychiatric disorder due to the stroke and physical handicap.
>
> E **In my opinion the stroke has fortunately not affected his cognitive function, mood or memory. He is able to conduct himself appropriately and instruct his son and other members of his staff to maintain his job and business.**
>
> (emphasis added)

F **[19]** Dr Xavier Vincent Pereira in his medical report also dated 8 April 2016 said:

> He is of sound mind and is able to think rationally. He has no abnormality of thought, mood or behavior.
>
> G His memory is intact and he is **able to make sound judgment.** This is my expert opinion.
>
> (emphasis added)

[20] In the second medical report prepared by Dr Xavier Vincent Pereira dated 24 May 2016 the following is indicated:

> H EXPERT OPINION
>
> The examination done on the patient also did not reveal any abnormality in appearance, behavior, speech, mood and effect, thought and perception. The assessment of cognitive functions revealed that the patient was well oriented to time, place and person. His short term and remote memory
I were also intact. And he **was able to make sound and rational judgment.**

Thus my conclusion from this evaluation of the patient is that **he is of sound mind and is able to make rational judgment.**

This is my expert opinion.

(emphasis added)

[21] In the second medical report prepared by Dr Deva Dass dated 27 May 2017 it is said:

In my opinion Mr. Tan's mental and intellectual **state have progressed remarkably since I saw him six weeks. He is in much better control of his emotions, thoughts and cognitive functions.**

The infarct on the right side of the brain due to blockage of the middle cerebral artery has not damaged the frontal and prefrontal areas of the brain. These areas are important in the cognitive functions and executive function. He is therefore **competent to continue with his task and direct his son to help him with the Company matters.**

(emphasis added)

[22] The medical report prepared by Dr Chiam Peak Chiang from Institute of Mental Health, Singapore dated 20 July 2016 states:

Mr Tan Kim Choo was accompanied by his son, Mr Tan Boon Tien, and daughter-in-law to the Institute of Mental Health on 19.7.2016 for a psychiatric examination to assess his mental capacity to handle his personal property and affairs.

…

Summary And Opinion

Based on the information available to me and my findings, I am of the opinion that **Mr Tan does not have depression, anxiety, psychosis, dementia or any mental disorder which would affect his judgment and cognitive function.**

He has the mental capacity to make decisions regarding his HSBC Bank account in that:

He understands information related to his bank account and what has happened to it;

He is able to retain the information;

He is able to use and weigh the information as part of making the decision;

He is able to communicate his decision.

(emphasis added)

[23] Finally, the medical report prepared by Dr Daniel Zainal Abdul Rahman on 11 October 2016 states:

A …

A mental State Examination revealed the patient to be coherent and relevant in his speech, and able to interact normally with me and his son and daughter-in-law. There was good eye contact, with appropriate facial and body language. He was emotionally stable, expressing a range of
B emotions appropriate to the topics being discussed.

During the interview he elucidated and articulated his thoughts very appropriately, and his line of thinking was clear and well thought out. He was spontaneous, and lively, considering his age and physical condition.

In my opinion the stroke has not affected his cognitive function, and he has had no
C *history before, or now, of any mood disturbances or memory problems, or any perceptual disturbances.*

He is able to conduct himself appropriately, and able to give the necessary instructions to his son and staff regarding his company. He is not on any psychiatric medications, or psychotropics.

D (emphasis added)

[24] All these raised a significant doubt on the *prima facie* case that has been raised by the daughters for an inquiry to be ordered by this court. These medical reports support the contention by the father and son that the father is mentally stable and far from being mentally challenged. The *prima facie*
E case has indeed been rebutted.

The Approach Taken

[25] Because of the conflicting medical reports by the daughters on one hand and the father and son on the other, I am of the finding that it is best
F to prefer the medical specialists' opinions obtained by the father and son. This is because the experts' medical reports of the father and son are more contemporaneous compared to the experts' reports of the daughters. The fact that it is more contemporaneous is not disputed by the daughters. As the reports reflect the latest mental condition of the father, the inquiry requested
G cannot be justified.

[26] It is also my finding where there are conflicting medical reports on the state of mental health of a person, it is incumbent that the benefit of doubt should be given to that person. It is totally unnecessary and more likely to cause injustice if the views of medical experts saying that person may be
H mentally challenged should prevail over the equally competent opposing medical experts who take a different stand. When things are equal, that very person should have a substantial say whether he is mentally able in view of the support he gets from his medical experts.

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[27] And in this regard, this court has the right to choose which medical reports should stand above the rest. For this, it is apposite to recall the words of the eminent judge Mohamad Ariff Md Yusof JCA (as he then was) when delivering the Court of Appeal's decision in *Majuikan Sdn Bhd v. Barclays Bank Plc* [2014] 9 CLJ 337; [2015] 1 MLJ 171 where it is said:

> Where there are conflicting expert opinions, the judge is of course entitled to bring to bear his own judicial appreciation of the matter and **choose one over the other** …
>
> (emphasis added)

The Father's Position

[28] This court also has a duty to recognise and acknowledge the father's stand and position bearing in mind the whole factual matrix of this case. Here is a case where the daughters say their father is likely to be mentally disordered. First, as can be appreciated, this is a very serious allegation coming from the daughters. But surely overriding this, the very person who is alleged to be mentally incapable has the right to say "Hang on there. How dare you say such a thing. I am fully mentally alert and far from turning insane!". And most importantly these statements are not uttered without support. The father has strong backing for these statements as seen from the best in the medical field. No wonder the father has said he does not wish to see his daughters anymore.

[29] To stress the point further, this is not a case where the medical reports favour the daughters alone. On the contrary, at the opposing side, there are equally qualified medical specialists who said that their father is not mentally challenged. It is close to a tragedy when a person shouts he is mentally able but still be subject to investigation to prove otherwise, when he is cogently supported by medical evidence.

[30] The finding that the father is mentally able and fit disposes of the contention regarding the refusal of the brother to reveal the whereabouts of the father. It does not matter whether this allegation against the son is true. It also put paid the arguments that the father had failed to attend to companies' duties on the possibility that he is mentally unwell. The latest medical reports indicating the father is mentally alert, also mean it is on the balance of probabilities of no consequence for the daughters to allege that their father had been taken out of hospital against his own free will. It also dismisses the allegation that he may have been deprived of continuous care, treatment, rehabilitation and protection that are needed for him.

The Caregiver's Assertions

[31] This court should also address the caregiver's accusations which have been highlighted earlier. No doubt the allegations levelled by the caregiver are serious especially on the son. However, it should not be lost that these allegations are made with the view of driving the point that the father is not mentally capable. The allegation that the son had used all unsavoury actions is with the intention to show that these are all made possible because the father is unable to independently act on his own. But as evidenced by the father and son's medical experts, the father is not mentally incapable. In fact, the father has been found to be able to think coherently and as indicated, has the mental capacity even to make decisions pertaining to his banking accounts.

[32] Therefore, on the balance of probabilities, in the face of these medical reports, the concerns expressed by the caregiver should remain and be treated as nothing more than just a loving and thoughtful affection of a responsible caregiver. Even if these allegations are true, the fact remains the father is not mentally unwell.

Conclusion

[33] When there are conflicting medical reports, a person should never be the subject of an inquiry to determine his mental health. He is entitled to the medical experts' opinions finding him mentally capable. To conclude that opposing medical experts' views on his mental health should be preferred over and above his own medical specialists cannot serve any justice on the very person others want to be declared mentally disordered. It is also to say the least, unsafe, especially when his own medical experts' reports are more recent compared to the opposing experts' reports.

[34] Only when there are no conflicting medical reports would it be legitimate to find that a person may have to undergo an inquiry to determine his mental health.

[35] Above all, because of the conflicting medical reports in this case and all the reasons alluded earlier, I am exercising my discretion not to order an inquiry pursuant to s. 52 of the MHA. The daughters' OS is therefore dismissed with costs.